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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2014-CA-000604-MR

ALISHA WILLIAMS WALLACE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 10-CI-001389

THE ZERO COMPANY AND
GREGORY MCAULIFFE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, THOMPSON AND VANMETER, JUDGES.

DIXON, JUDGE: Appellant, Alisha Williams Wallace, appeals from a jury verdict and judgment finding Appellee, Gregory McAuliffe, solely responsible for a motor vehicle accident but only awarding her a small percentage of the damages she claimed as a result of said accident. Wallace also appeals from the Jefferson

Circuit Court's denial of her motion for a new trial on damages. Finding no error, we affirm.

This matter arises out of an automobile accident that occurred on March 15, 2007, in Louisville, Kentucky. McAuliffe[1] was waiting to pull out of a parking lot and turn left onto Poplar Level Road, which is two lanes in both the northbound and southbound directions. Traffic was backed up when a motorist in the curb lane stopped and motioned to McAuliffe to pull out. However, as McAuliffe began to turn left across the two southbound lanes he could not see that Wallace was approaching in the center southbound lane, resulting in McAuliffe's truck colliding with the passenger side of Wallace's front bumper. Both drivers were wearing seatbelts at the time of the accident and neither claimed to be injured. Further, both were able to drive their vehicles away from the accident scene.

Later the same evening, Wallace went to the emergency room complaining of head and knee pain. All tests were negative for any objective injury but she was diagnosed with a possible concussion and sprained knee. Wallace later sought treatment for continuing headaches from Dr. Michael Sowell, a neurologist and Director of the University of Louisville Comprehensive Headache Program, who diagnosed her with post-traumatic headache/post-concussion syndrome.

On March 3, 2010, Wallace filed a personal injury action against McAuliffe in the Jefferson Circuit Court, claiming that as a result of McAuliffe's

[1] It is undisputed that at the time of the accident McAuliffe was acting within the scope of his employment with The Zero Company.

negligence she incurred present and future medical expenses, as well as suffered lost earnings and permanent impairment to her power to earn money, and present and future pain and suffering. In his answer, McAuliffe asserted the doctrine of comparative negligence, claiming that Wallace's own negligence contributed to the accident.

A four-day jury trial was conducted in October 2013. During her case-in-chief, Wallace testified that prior to the accident, she was a pre-med student at the University of Louisville but as a result of the accident, she suffered daily migraine headaches, could only read at a seventh grade level, and suffered from memory loss, confusion and anxiety. However, Wallace also acknowledged that she had recently graduated from college with a bachelor's degree in psychology.

Wallace's treating physician, Dr. Michael Sowell, a neurologist and Director of the University of Louisville Comprehensive Headache Program, testified that Wallace suffered from post-traumatic headache/post-concussion syndrome. Sowell opined that Wallace's headaches were caused by the subject car accident because she had no prior history of such. However, on cross-examination, defense counsel pointed to at least two references in Dr. Sowell's records wherein it was noted that Wallace, as well as her mother, had a history of migraine headaches.

Finally, in support of her medical expenses, Wallace presented a summary of medical and pharmacy bills that had been prepared by her attorney

totaling $42,291.88. However, during cross-examination, Wallace was able to discuss the treatment and benefits of only a few of the fourteen medical providers listed in the summary.

During his defense, McAuliffe presented evidence that Wallace had incurred similar injuries in a prior rear-end collision in 2005, as well as a subsequent accident in 2008 when her vehicle was t-boned by a truck in her driver's side door. McAuliffe pointed out that none of the medical tests Wallace underwent following the subject accident showed any objective evidence of a head injury. Finally, McAuliffe presented the testimony of psychologist Dr. Michael Ebben, who criticized the psychological testing process that Wallace had participated in since the subject accident. Dr. Ebben testified that repeatedly taking the same neuropsychological test allows a patient to become "test savvy" and able to control the results. Dr. Ebben stated that from his review of Wallace's medical records, he believed she could be malingering and that her test results were not a reliable indicator of any cognitive impairment.

At the close of evidence, the jury found McAuliffe to be solely at fault in causing the accident. However, the jury only awarded Wallace $65,352 of the $5.8 million she sought in damages. Specifically, the jury awarded $12,352 for past medical expenses and treatment, and $53,000 for past pain and suffering. The jury awarded nothing for future medical expenses, future pain and suffering, and loss of power to earn money.

Wallace thereafter filed a motion for a new trial on the issue of damages, arguing that the trial court should have granted a directed verdict in her favor because McAuliffe offered no medical testimony to impeach the reasonableness of her medical expenses. Wallace also argued that the jury erroneously relied on evidence of her two other prior motor vehicle accidents as well as prejudicial photographs of her vehicle damage. Finally, Wallace alleged that defense counsel's misconduct during opening and closing statements warranted a new trial. By order entered March 11, 2014, the trial court denied the motion. This appeal ensued.

Wallace first argues that she was entitled to a directed verdict on her claimed past and future medical expenses. Wallace contends that Dr. Sowell unequivocally testified that she suffered a traumatic brain injury, and that all of her past and future medical expenses were directly related to the March 15, 2007 accident. Citing to *Louisville & I.R. Co. v. Frazee*, 179 Ky. 488, 200 S.W. 948, 950 (1918), Wallace argues that under Kentucky law, it was improper for the trial court to submit the issue of reasonableness or relatedness of medical expenses to the jury when the proof is uncontradicted.

The standard for appellate review of a denial of a directed verdict motion is whether the trial court's ruling was clearly erroneous. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). Unless the reviewing court is convinced that the jury's verdict was flagrantly against the evidence and the result of passion or prejudice, the verdict and judgment should be affirmed. *Id.* at 19.

Generally, it is within the province of the jury to determine whether medical expenses, or any part thereof, are necessary, reasonable, and injury-connected. *Jones v. Mathis*, 329 S.W.2d 55 (Ky. 1959). However, "[t]he question regarding the propriety of medical bills does not become a matter for the jury's resolution if there is *nothing* in the record tending to show a dispute about the amount of those bills or their relationship to the alleged injuries underlying the action." *Morgan v. Scott*, 291 S.W.3d 622, 643 (Ky. 2009) (Emphasis added).

Wallace states in her brief that Dr. Sowell unequivocally testified that all of her past and future medical expenses were reasonable, necessary and related to the subject accident. In fact, however, Dr. Sowell was never presented with the summary of Wallace's expenses and rendered no opinion on such. While Dr. Sowell did testify that the treatment Wallace received was reasonable and related, he also conceded on cross-examination that his records indicated she had a family history of headaches, thus raising a question as to the relatedness of the headaches to the subject accident. With respect to future medical expenses, Dr. Sowell expressly stated that he could not render an opinion as to the necessity or extent of any future treatment. Dr. Sowell explained that because of the unpredictable nature of headaches it was as likely that Wallace's headaches could suddenly disappear as it was that they could continue indefinitely.

As the trial court noted, McAuliffe presented substantial evidence and testimony that no objective medical tests substantiated Wallace's complaints; that she drove away from the scene of the subject accident after stating she was not

injured; that she was involved in two other accidents that could have contributed to her alleged medical condition; and that she may have "grossly exaggerated" the extent of her injuries. As noted by a panel of this Court in *Carlson v. McElroy*, 584 S.W.2d 754, 756 (Ky. App. 1979),

> [T]he jury was not bound to accept as the absolute truth the testimony of either Carlson or her doctors relating to her injuries, and having the opportunity to observe Carlson giving her testimony and to hear first hand all the other evidence in arriving at their verdict, the jury could have believed Carlson grossly exaggerated the extent of her injuries, if any, or that her injuries were not as a result of this accident. (Citations omitted).

We are of the opinion that the trial court properly ruled that the jury was entitled to determine whether all of Wallace's claimed past and future medical expenses were necessary, reasonable and related to the subject accident. As such, the trial court's denial of a directed verdict as well as its denial of a new trial on this issue was proper.

Wallace next argues that the trial court's admission of photographs depicting the vehicle damage warrants a new trial. Prior to trial, Wallace filed a motion in limine to prohibit any testimony or photographic evidence regarding the extent of property damage to the parties' vehicles caused by the accident. Following the arguments of counsel, the trial court denied the motion, ruling,

> These facts are clearly relevant. The pictures of the automobile, the witnesses' descriptions of the accident go to the heart of the issue, the nature and extent of the alleged injuries, proximate cause, credibility, [and] impeachment. All of those issues make the photographs and testimony relevant to the issue that the jury has to

> decide. I think, again, that the Plaintiff's objections go more toward the weight of the evidence rather than its admissibility.

Wallace now argues that the photographs were irrelevant and prejudicial because the condition of the vehicles did not make her injury more or less probable. Further, she contends that the defense introduced the evidence solely to allow the jury to speculate, without any scientific or technical support, that minor property damage equated to minor physical injuries.

The question of whether McAuliffe was solely at fault in causing the accident was disputed at trial. McAuliffe maintained that his vehicle was no more than two feet into Wallace's lane and that she could have easily avoided the collision. Wallace, on the other hand, testified that "he wasn't in my lane. He came from the side." One authenticated photograph of each vehicle was admitted to show that the center of McAuliffe's bumper made contact with the right front corner of Ms. Wallace's car.

We find no merit in Wallace's claim that McAuliffe was required to present an expert witness to testify as to the relationship between the vehicular damage and the extent of her injuries. Contrary to Wallace's argument, McAuliffe was not attempting to scientifically prove or disprove Wallace's injuries by establishing the "vehicle-to-vehicle energy transfer."

"[T]he admissibility of photographs is within the sound discretion of the trial court, and its ruling . . . will not be interfered with on appeal except upon clear showing of an abuse of discretion." *Gorman v. Hunt*, 19 S.W.3d 662, 668 (Ky.

2000). We agree with the trial court that the photographs were relevant to the issue of causation. Furthermore, because Wallace introduced evidence pertaining to her vehicle's "undrivability," her subsequent repair bill, and testimony about skid marks on the road in an effort to establish speed, McAuliffe was entitled to introduce the vehicle photographs for impeachment purposes. We find no abuse of discretion herein.

Wallace next argues that the admission of evidence of McAuliffe's physical condition immediately following the accident was erroneous and warrants a new trial. Wallace filed a motion in limine to exclude any evidence or testimony relating to McAuliffe's lack of injuries. The trial court denied the motion on the grounds that such evidence was relevant. Wallace maintains that McAuliffe's testimony at trial regarding his condition immediately after the wreck was irrelevant and prejudicial.

We have carefully reviewed the trial video and find absolutely no reference to the complained of testimony. McAuliffe did testify that he submitted to an alcohol and blood test following the accident per his company's employment policies. Unquestionably, however, McAuliffe did not in any manner describe his physical condition or lack of injuries following the accident. As such, this argument is without merit.

Wallace further argues that the introduction of evidence pertaining to her other two accidents warrants a new trial. The trial court previously had denied Wallace's motion in limine to exclude any evidence or testimony relating to her

2005 and 2008 accidents. Wallace now complains that the evidence was wholly irrelevant and prejudicial because it had no bearing on her claims resulting from the subject accident. Again, we disagree.

Wallace's reliance on *Kentucky Farm Bureau Mutual Insurance Company v. Rodgers*, 179 S.W.3d 815 (Ky. 2005) and *Baker v. Hancock*, 772 S.W.2d 638 (Ky. App. 1989) are misplaced. *Rodgers* involved prior bad acts in handling insurance claims and is inapposite to the facts herein. Similarly, *Baker* simply held that "evidence of other negligent acts should be excluded when offered to prove negligence on a particular occasion." 772 S.W.2d at 640. Herein, the evidence of Wallace's other two accidents was not offered to prove her negligence in the subject accident, but rather for the purpose of establishing alternative causes for her claimed medical conditions. "Evidence of a prior and succeeding accident" is clearly relevant to the issue of injury causation. *Carlson*, 584 S.W.2d at 756. *See also Massie v. Salmon*, 277 S.W.2d 49 (Ky. 1955).

Furthermore, we must agree with McAuliffe that evidence of the other accidents was admissible for impeachment purposes. Specifically, Wallace produced photographs that she testified depicted the bruising she suffered on the left-side of her body from hitting the driver's door. Yet during cross-examination, Wallace's husband testified that he took the photographs in the apartment where they lived at the time of the 2008 accident, not the subject accident. Clearly, evidence of the 2008 accident was relevant as to when Wallace's claimed injuries actually occurred. Moreover, Wallace's vocational expert testified that her

opinions as to Wallace's lack of future earning capacity were based on an assumption that all of her injuries were caused by the subject accident. However, factored into her opinion was Wallace's claim of a low back injury, which Wallace conceded she suffered as a result of the 2005 accident. Accordingly, we must conclude that the trial court did not abuse its discretion in allowing evidence of Wallace's two other accidents

Finally, Wallace argues that defense counsel made multiple comments during opening and closing statements that were inappropriate, outside the evidence, designed to solely inflame the jury, and that were detrimental to the civil justice system and legal profession as a whole. The trial video reveals that during opening statements, defense counsel commented that Wallace had taken the same neuropsychological test repeatedly and had learned or was coached how to manipulate the test and/or appear injured. The trial court sustained Wallace's counsel's immediate objection, and Wallace's counsel did not ask for any further relief, including an admonition. During closing argument, defense counsel again referred to the tests, noting that Dr. Ebben had testified that as a result of taking the neuropsychological tests repeatedly, Wallace had become "test savvy" and had learned to control the outcome. Defense counsel further stated that Wallace was simply a victim who had been caught up in a system where people think they can turn a "fender bender into cash" and that a lawsuit can be a "lottery ticket". Significantly, no objection was made to any comments during defense counsel's closing statements.

"Opening and closing statements are not evidence and wide latitude is allowed in both." *Wheeler v. Commonwealth*, 121 S.W.3d 173, 180 (Ky. 2003) (c*iting Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1987)). Furthermore, "[i]t is not improper for counsel to ask the jury to assess the other side's case critically." *Baston v. County of Kenton ex rel. Kenton County Airport Bd.*, 319 S.W.3d 401, 412 (Ky. 2010). To that end, counsel is permitted to recall the evidence and characterize it in a light favorable to his or her client. *Id.*; *see also Padgett v. Commonwealth*, 312 S.W.3d 336, 352 (Ky. 2010) (Noting "the general rule that in closing arguments counsel may make reasonable inferences based on the evidence.").

In her brief, Wallace cites to *Smith v. McMillan*, 841 S.W.2d 172 (Ky. 1992), wherein our Supreme Court held that "in the presence of improper argument, an award of what appears to be excessive or inadequate damages may be presumed to have been so influenced." *Id.* at 175 (*citing Stanley v. Ellegood*, 382 S.W.2d 572 (Ky. 1964). The *Smith* Court concluded under the facts presented therein, it had "no reluctance to presume that the jury's failure to award damages, despite its finding of negligence, was influenced by the improper jury argument and the trial court's erroneous rulings on appellant's objections." *Id.*

We are of the opinion that the instant matter is distinguishable from *Smith*. First, the jury herein awarded reasonable damages to Wallace, in light of the evidence presented. Second, unlike the attorney in *Smith*, counsel herein did not raise any objections during defense counsel's closing argument. Contrary to

Wallace's belief, complaining of defense counsel's statements in a motion for a new trial does not preserve the issue for review. "An objection to the remarks and conduct of counsel must be made at the time, and a ruling had thereon, else they cannot be considered on appeal." *Greathouse v. Mitchell*, 249 S.W.2d 738, 741 (Ky. 1952). By electing to take her chances with the jury rather than seeking relief from the trial court, Wallace has waived the right to complain of defense counsel's comments on appeal. *See generally Arnett v. Commonwealth*, 470 S.W.2d 834, 838 (Ky. 1971).

Notwithstanding, we agree with the trial court herein that defense counsel's alleged misconduct did not rise to a level tantamount to the attorney misconduct necessary to warrant reversal. As the trial court observed, "[h]is statements did not address matters not in evidence. While both counsel cast aspersions on the other, no one impugned the other's integrity or inspired prejudice or sympathy." We are of the opinion that defense counsel's comments did not constitute palpable error warranting a new trial. RCr 10.26.

For the reasons set forth herein, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kevin C. Burke
Louisville, Kentucky

Vanessa Cantley
Nathan Williams
Louisville, Kentucky

BRIEF FOR APPELLEES:

Stockard R. Hickey, III
Louisville, Kentucky